

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of The Manual Dial)	
Company, LLC)	
)	CG Docket No. ____
Petition for Declaratory Ruling)	
)	CG Docket No. 02-278
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991))	

PETITION FOR DECLARATORY RULING

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PETITION FOR DECLARATORY RULING

The Manual Dial Company, LLC (“Manual Dial”) respectfully petitions the Federal Communications Commission (“FCC” or “Commission”) for entry of a Declaratory Ruling approving its proposed manually-dialed operator-initiated polling cellular call program.

I. MANUAL DIAL’S PROPOSED MANUALLY-DIALED OPERATOR-INITIATED POLLING CELLULAR CALL PROGRAM

Manual Dial’s proposed manually-dialed operator-initiated polling call program will operate as follows: a manual dialer working at a computer workstation will select up to four cellular telephone numbers to dial from options on the ManualCalls ProgramBalancer database to copy to the workstation’s clipboard. The manual dialer will then open the workstation’s Rocket25 soft phone program and paste the selected cellular telephone numbers into the soft phone. Once selected, copied, and pasted, the manual dialer must click “enter” to dial the telephone numbers. Telephone call recipients are placed into teleconferences with a live greeter.

The live greeter will invite the cellular telephone call recipients to participate in a poll. The live greeter will advise participants that the first question will be asked by the live greeter, but subsequent questions are prerecorded and by continuing with the poll, the recipient consents to hear them. The participants must consent to hearing the prerecorded questions by responding to the first question asked by the live greeter using their telephone keypad. If the telephone call recipients do not answer the first question using their cellular telephone keypad, answer the first question using an invalid key, or end the call without responding to the first question, the telephone call will terminate and the recipient will not hear the prerecorded voice.

II. THE MANUAL DIALING SYSTEM IS NOT AN AUTOMATIC TELEPHONE DIALING SYSTEM

FCC regulations prohibit the initiation of telephone calls using an “automatic telephone dialing system” telephone to numbers assigned to cellular telephones without the recipients’ prior express consent.¹ Telephone calls initiated without using ATDS do not require the recipients’ prior express consent.

Both the Telephone Consumer Protection Act (“TCPA”) and FCC regulations define an “automatic telephone dialing system” as “[e]quipment which has the *capacity* to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.”² (emphasis added).

At issue in determining whether dialing equipment constitutes ATDS is how to measure capacity. In a prior Declaratory Ruling, the FCC adopted an expansive interpretation, declaring that dialing equipment can meet the definition of ATDS even if

¹ 47 C.F.R. § 64.1200(a)(1)(iii).

² 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(2).

it cannot currently store or produce, and dial random or sequential numbers,³ noting “[t]he capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities.”⁴

Though the FCC declined to put forth an objective test to determine whether particular equipment constitutes an ATDS,⁵ it did provide some boundaries to guide such determinations:

We do, however, acknowledge that there are outer limits to the capacity of equipment to be an autodialer. As is demonstrated by these precedents, the outer contours of the definition of “autodialer” do not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers—otherwise, a handset with the mere addition of a speed dial button would be an autodialer. Further, although the Commission has found that a piece of equipment can possess the requisite “capacity” to satisfy the statutory definition of “autodialer” even if, for example, it requires the addition of software to actually perform the functions described in the definition, *there must be more than a theoretical potential that the equipment could be modified to satisfy the “autodialer” definition*. Thus, for example, it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of “autodialer,” but such a possibility is too attenuated for us to find that a rotary-dial phone has the requisite “capacity” and therefore is an autodialer.⁶

Furthermore, the FCC concluded that “the TCPA’s unqualified use of the term ‘capacity’ was intended to prevent circumvention of the restriction on making autodialed calls to wireless phones and emergency numbers”⁷ If the dialing system used requires additional equipment or modifications to make autodialed calls, as opposed to

³ 2015 Omnibus Ruling, FCC 15-72, para. 10.

⁴ *Id.* at para. 16 (citing 1992 TCPA Order, 7 FCC Rcd at 8755, para. 6; 2003 TCPA Order, 18 FCC Rcd at 14091, para. 131).

⁵ *Id.* at para. 17 (“[W]e do not at this time address the exact contours of the “autodialer” definition or seek to determine comprehensively each type of equipment that falls within that definition that would be administrable industry-wide.”).

⁶ *Id.* at para. 18 (citing 2003 TCPA Order, 18 FCC Rcd at 14091-93, paras. 131-133) (emphasis added).

⁷ *Id.* at para. 14.

simple software additions or modifications, the user is not attempting to “circumvent” the TCPA’s restrictions on calls made to cell phones by using the dialing system.

Manual Dial’s proposed manually-dialed polling calls can only be initiated through the combination of the manual dialers’ actions of selecting, cutting, pasting, and “entering” the cellular telephone numbers to be dialed. The Rocket25 soft phone platform is unable to store or produce telephone numbers to be dialed, nor is it able to generate and dial numbers randomly or sequentially. The Rocket 25 hardware is physically separate from any automatic telephone dialing system and does not share hardware with any such system. The Rocket25 hardware, in its current state, cannot accept or accommodate software which would allow it to operate as an ATDS, and could only operate as an ATDS if modifications were made to it which were so extensive as to be theoretical in nature.

III. THE OPERATOR-INITIATED PRERECORDED POLL OBTAINS PRIOR EXPRESS CONSENT

FCC regulations also prohibit the initiation of any call to a cellular telephone using a prerecorded voice without the recipient's “prior express consent” regardless of the manner in which the calls are initiated or the platform that is utilized.⁸ However, the FCC has not provided a specific procedure to follow in order to satisfy that requirement. For example, the Commission in a previous ruling determined that an individual providing a phone number would satisfy the consent standard, allowing for that individual to be called at a later date consistent with the TCPA rules.⁹ We respectfully submit the call program proposed by Media Dial, requiring the call recipient, responding to a live caller

⁸ 47 C.F.R. § 64.1200(a)(1)(iii).

⁹ 1992 FCC Order, 7 FCC Rcd. 8752, 8769 (Oct. 16, 1992).

to press the telephone keypad if the call recipient wished to receive an automated poll, is a way of providing prior express consent, in a similar way as providing a phone number, and therefore, clearly complies with the Commission's prior express consent standard.

Manual Dial's live greeter will inform the recipients of the operator-initiated polling calls that by continuing with the poll after the live greeter asks the first question, the recipient is consenting to hear a prerecorded voice. To continue with the poll, the participants must affirmatively respond to the first question asked by the live greeter using their telephone keypad. If the telephone call recipients do not answer the first question using their telephone keypad, answer the first question using an invalid key, or end the call without responding to the first question, the telephone call will terminate and the recipient will not hear the prerecorded voice.

CONCLUSION

Based on our reading of FCC regulations and prior Commission Rulings, we conclude that Manual Dial's proposed cellular polling call program:

- (1) does not constitute the use of an automatic telephone dialing system;
- (2) uses equipment and methodologies in placing the proposed calls that lacks the requisite "'capacity' to store or produce telephone numbers to be called using a random or sequential number generator"; and
- (3) obtains a call recipient's consent prior to hearing a prerecorded poll on the recipient's cellular phone in a manner that satisfies the FCC's requirement that callers obtain a call recipient's "prior express consent" before receiving a prerecorded message.

We respectfully request the Commission's confirmation and determination that the proposed Manual Dial cellular polling call program complies with the FCC requirements discussed above.

Respectfully submitted,

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